UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE PALMA, Petitioner, -against- UNITED STATES OF AMERICA, Respondent.	S1 03 Cr. 1484 (JFK) 08 Cv. 1934 (JFK) **MEMORANDUM OPINION & ORDER**

JOHN F. KEENAN, United States District Judge:

Petitioner Jose Palma ("Palma" or "Petitioner") pleaded guilty to conspiring to distribute five kilograms or more of cocaine and was sentenced to a term of 70 months imprisonment. He now moves pro se to vacate, set aside, or correct his conviction, pursuant to 28 U.S.C. § 2255, on the grounds that (i) his plea was unknowing and involuntary, and (ii) his counsel was ineffective for inducing Palma to plead guilty by falsely promising Palma that he would receive a minor role adjustment and thus be sentenced under a lower applicable Sentencing Guidelines range. In addition, Palma has requested that the Court appoint counsel, pursuant to 18 U.S.C. § 3006A(a)(2)(B), to assist him with the present claims. For the reasons that follow, Palma's petition for habeas relief and his request for appointment of counsel are denied.

BACKGROUND

a. *Arraignment*

A two-count Superseding Indictment (the "Indictment"), filed on August 18, 2004, charged Palma with (1) conspiring to distribute five kilograms and more of mixtures and substances containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846; and (2) possessing with intent to distribute approximately ten kilograms of cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2. Palma was arraigned on the Indictment on October 12, 2004 and was represented by Justin Levine, Esq. During the arraignment, Palma was asked whether he had seen a copy of the Indictment and whether he had discussed it with his attorney. To both questions, Palma answered, "Yes." Arraignment Tr. at 6.

b. *Guilty Plea*

On March 9, 2005, pursuant to United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991), the government provided Palma's new counsel, Jeremy Orden, Esq. ("Orden"), with a letter containing the government's position on the application of the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G.") to the case. The letter stated that Palma's offense carried a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment. Based on the amount of cocaine attributable to Palma, the government calculated Palma's base offense level as 32, pursuant to the November 2004 Sentencing Guidelines Manual. The government stated that Palma's total adjusted offense level was 27, which reflected a two-level reduction for his eligibility for safety valve treatment, a two-level reduction for clearly demonstrating acceptance of responsibility through his plea allocution, and a one-level reduction for giving timely notice of his intention to plead guilty. Palma's Criminal History Category of I and the adjusted offense level of 27 yielded an applicable Guidelines range of 70 to 87 months' imprisonment.

On March 10, 2005, Palma pleaded guilty before me to Count One of the Indictment. Palma was again represented by Orden. Before accepting his plea, I conducted a hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure while Palma was under oath. When again asked if he had received a copy of the Indictment and had gone over it with his attorney, Palma answered, "Yes." Plea Tr. at 4. When asked, "Did [your attorney] explain to you the charges in the indictment and do you feel that you understand them," Palma answered, "Yes, your Honor." Id. Palma then confirmed that he had told his attorney everything about his case.

Next, the Court ensured that Palma understood that he had the right to go to trial, where he would have the assistance of counsel and would be presumed innocent unless and until the government proved his guilt beyond a reasonable doubt to all twelve jurors. The Court also explained all of the rights Palma would enjoy at trial, and Palma said that he understood those rights.

The Court then informed Palma of the consequences of his guilty plea. Palma was told that his conviction carried a mandatory minimum sentence of ten years and a maximum sentence of life. Palma replied that he understood this. The Court also stated Palma's possible maximum and minimum term of supervised release, fine range, special assessment, and restitution. Palma was also informed of the likelihood that he would be deported after his release. In addition, Palma was told that the government, in its Pimentel letter, calculated his applicable guideline sentencing range to be 70 to 87 months, assuming he qualified for safety valve treatment. Palma again responded that he understood. I then said, "I have no idea what the sentence is going to be right now," which Palma also said he understood. Plea Tr. at 10.

Palma was then asked if he was "offering to plead guilty of [his] own free will." Plea Tr. at 10. Palma answered, "Yes, your Honor." Id. I then asked Palma if he had "been induced to offer to plead guilty by reason of any promise or statement by anybody to the effect that you will get leniency or special treatment by pleading guilty instead of going to trial." Plea Tr. at 10. Palma responded, "No, your Honor." Id. Palma also stated that he had not been induced to plead guilty by pressure, fear, threat, or force. When the Court inquired whether there was anything Palma wanted to ask about the charges or the consequences of pleading guilty, Orden interjected and spoke about Palma's belief that he deserved a downward adjustment for his minor role in the drug conspiracy. Orden said that he would be submitting a letter brief on the issue prior to sentencing. I reiterated that I did not then know Palma's role in the offense, how I would decide the request for a minor role adjustment, or what his sentence was going to be.

Palma then admitted that he had a deal or agreement with others to distribute more than five kilograms of cocaine and that he delivered about ten kilograms to another person. His guilty plea was then accepted.

c. *Sentencing*

After the plea, the Probation Office prepared a presentence report ("PSR"). The PSR, like the Pimentel letter, calculated Palma's base offense level as 32; recommended downward adjustments of two points for safety valve treatment, two points for demonstrating acceptance of responsibility, and one point for giving timely notice of his intention to plead guilty; and concluded that the adjusted offense level of 27, combined with a Criminal History Category of I, yielded an applicable Guidelines range of 70 to 87 months.

Palma was sentenced on September 1, 2005. Orden represented Palma at the hearing and stated that he had reviewed the PSR with his client. Orden argued in favor of Palma's receipt of a minor role adjustment. I concluded that a minor role adjustment was inapplicable, because Palma was no less culpable than the average narcotics conspiracy participant and had already benefitted from a safety valve reduction. Palma was then sentenced to 70 months' imprisonment and three years of supervised release. The Court granted Orden's application to be relieved from handling Palma's appeal on the condition that Orden file a notice of appeal on Palma's behalf, if Palma desired to appeal, before withdrawing from the case.

On the same day as Palma's sentencing, a timely notice of appeal was filed on his behalf. Palma's appellate brief, submitted by appointed counsel, Robin Smith, Esq., argued only that the Court had improperly denied Palma a minor role adjustment. On November 29, 2007, the United States Court of Appeals for the Second Circuit affirmed Palma's sentence. See United States v. Palma, 255 F. App'x 580 (2d Cir. 2007). Palma filed the instant petition on February 27, 2008.[1] On March 17, 2008, Palma filed an application for the appointment of counsel, pursuant to 18 U.S.C. § 3006A(a)(2)(B).

DISCUSSION

a. *Voluntariness of Guilty Plea*

Palma argues that his guilty plea was unknowing and involuntary. Specifically, he asserts that he never saw a copy of the superseding indictment; was unaware of the charge to which he pleaded; and did not understand the consequences of the plea, the nature and elements of the charges, the pertinent law, or the government's burden.

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[1] Palma initially petitioned to vacate his sentence pursuant to 28 U.S.C. § 2255 on October 13, 2006, while his direct appeal was still pending. Accordingly, I dismissed the petition without prejudice for renewal once his appeal was decided.

Because Palma failed to challenge the validity of his plea on direct appeal, his present claim is procedurally barred. To attack a plea's validity on collateral review, it must have been first challenged on direct review. Bousley v. United States, 523 U.S. 614, 621 (1998) (finding procedural default where, as here, petitioner failed to challenge the validity of his plea on direct appeal validity); see also Rosario v. United States, 164 F.3d 729, 732 (2d Cir. 1998). On his direct appeal, Palma argued only that the Court improperly failed to impose a downward adjustment for his minor role in the conspiracy. Thus, Palma's present challenge to the validity of his plea is procedurally defaulted.

Apart from being procedurally barred, Palma's challenge to his plea's validity is clearly without merit. His sworn in-court statements show that his plea was in fact made knowingly and voluntarily. "[S]tatements at a plea allocution 'carry a strong presumption of verity.'" Gutierrez v. United States, No. 04 Civ. 6529, 02 CR. 1312 (DAB), 2005 WL 2207026, at *4 (S.D.N.Y. Sept. 6, 2005) (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)). Therefore, "'unsupported allegations [that] merely contradict[] [Palma's] earlier statements made under oath at his plea allocution'" do not demonstrate that his guilty plea was involuntary. Id. (citing United States v. Gonzalez, 970 F.2d 1095, 1101 (2d Cir. 1992)) (second alteration in original); see also Chen v. United States, Nos. 06 Civ. 7159 (SAS), 02 Cr. 1039 (SAS), 2007 WL 4358466, at *3 (S.D.N.Y. Dec. 7, 2007) (holding that the defendant's plea was made knowingly and voluntarily when his allegations were "belied by the statements he made at his plea allocution").

Here, Palma's present claims are directly contradicted by his own sworn statements. At both his arraignment and his plea hearing, Palma acknowledged that he had seen the superseding Indictment and reviewed it with his attorney. Moreover, Palma confirmed at the plea hearing that Orden had explained the charges in that Indictment and that he understood them. Furthermore, the Court explained in detail all of consequences Palma faced in pleading guilty, including the statutory minimum and maximum sentences and terms of supervised release, the applicable Guidelines range that the government had calculated, the maximum statutory fine and the fine range under the Guidelines, the requirement of a special assessment, possible restitution, and possible deportation. Palma responded that he understood all of this information. The Court also explained during the plea allocution, and Palma said he understood, that it was the government's burden to prove his guilt beyond a reasonable doubt. Palma's present assertion that his plea was unknowing or involuntary, in addition to being procedurally barred, is thus contradicted by the record.

b. *Ineffective Assistance of Counsel Claim*

Palma argues that his counsel was ineffective for (1) inducing him to plead guilty by promising to secure, and then failing to argue for, a minor role adjustment and a resultant lower Guidelines Range of 46 to 57 months; and (2) failing to file a notice of appeal to the Second Circuit.

For Palma to mount a successful claim of ineffective assistance of counsel, he must show (i) that his counsel's performance was deficient and (ii) that this deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish that his counsel's performance was constitutionally deficient, Palma must show that Orden "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. The inquiry is "whether counsel's assistance was reasonable considering all the circumstances," and there is a strong presumption of reasonableness. Id. at 688-89.

Palma has failed to show that Orden's performance was unreasonable. Palma's claim that his guilty plea was induced by Orden's false promise that he could obtain a minor role adjustment is contradicted by Palma's sworn testimony at the plea hearing. Palma stated at the hearing that he was pleading guilty of his own free will and without inducement by reason of a promise. This sworn statement trumps his present, conclusory allegation that he was, in fact, induced to plead guilty on the basis of Orden's guarantee of a minor role downward adjustment. See Allison, 431 U.S. at 74; see also Hernandez v. United States, 280 F. Supp. 2d 118, 122-23 (S.D.N.Y. 2003) (noting that "a defendant's sworn statements in open court . . . carry a strong presumption of verity which cannot be overcome by conclusory allegations") (citing Allison, 431 U.S. at 74). Palma's "uncorroborated assertion that he was induced to plead guilty by his attorney's false promise is not enough to overcome the presumption of voluntariness created by his sworn statements to the Court during his plea allocution." Gutierrez, 2005 WL 2207026, at *4.

Moreover, Palma's claim that he was prompted to plead guilty by Orden's false guarantee is belied by the record. As discussed, Palma was informed at his plea hearing, and acknowledged that he understood, that the government, in its Pimentel letter, calculated that his applicable Guidelines range was between 70 and 87 months. Further, Palma was told by the Court that there was no certainty as to what his ultimate sentence would be, and that the Court did not know how it would rule on Palma's application for a minor role adjustment. Thus, Palma was made well aware that he could be exposed to a sentence within the range of 70 and 87 months and that there was no guarantee that he would receive the minor role adjustment. Under these circumstances, his present claim that he pleaded guilty on the basis of Orden's assurance that he would receive the minor role adjustment is especially unavailing.

Palma's claim that his attorney did not argue for the minor role adjustment during sentencing is also baseless. Prior to sentencing, the Court received and considered Orden's letter brief, in which Orden argued that Palma deserved a downward adjustment because of his minor role. At the sentencing hearing, Orden brought up the issue of the minor role adjustment, and the Court stated as follows: "[Y]ou've certainly brought [the issue of the minor role adjustment] to my attention and I've read your submission and I've read the government's submission and I've certainly considered the appropriateness of doing that. So there is no question that the issue of whether there was a minor role is before me." Sent. Tr. at 4-5. Orden then reiterated his argument in favor of a minor role. Thus, contrary to Palma's present assertion, it is clear that his counsel did in fact argue for a minor role adjustment.

In sum, Palma's present allegations are rendered baseless by the record of his sworn testimony at the plea and sentencing hearings. Palma therefore has failed to establish that he was induced to plead guilty by Orden's false guarantees or that Orden otherwise performed unreasonably. Accordingly, Palma has not met the first prong of Strickland, and the Court need not address whether the purported deficiency resulted in any prejudice. See Strickland, 466 U.S. at 697 ("[T]here is no reason for a court . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Palma's claim that his counsel was ineffective for failing to file a notice of appeal is also without merit. During Palma's sentencing hearing, the Court granted Orden's application to be relieved on the condition that he file a notice of appeal if Palma decided to challenge his sentence. A notice of appeal was filed on Palma's behalf on the same day as his sentencing. Although it is unclear from the record whether it was Orden or another attorney who filed the notice, the identity of the attorney is irrelevant. Notice of Palma's appeal was timely filed and the appeal itself was litigated before the Second Circuit.

c. *Application for Counsel*

Although prisoners do not have a constitutional right to counsel when collaterally attacking their convictions, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), the Court has discretion to appoint counsel for § 2255 petitioners when it "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). The paramount factor considered by courts in determining whether to appoint counsel to indigent habeas petitioners is "whether the indigent's position seems likely to be of substance." Hendricks v. Coughlin, 114 F.3d 390, 392 (2d Cir. 1997) (internal quotation marks and citation omitted). In order to make such a determination, the Court must decide whether, "the claims asserted by the plaintiff may have merit, or the plaintiff appears to have some chance of success." Ferrer v. Artus, No. 04 Civ. 5063, 2005 U.S. Dist. LEXIS 14118, at *2-3 (S.D.N.Y. July 12, 2005) (internal quotation marks and citations omitted). Because Palma's claims clearly are without merit, appointment of counsel is unwarranted, and Palma's application is denied. See Peterson v. Greene, No. 06 Civ. 41, 2008 U.S. Dist. LEXIS 47332, at *40-41 (S.D.N.Y. June 18, 2008).

CONCLUSION

For the reasons set forth above, Palma's petition for habeas relief and application for appointment of counsel are both DENIED. Because Palma has not made a "substantial showing" of the denial of a constitutional right, this Court will not grant a certificate of appealability. Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir. 2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). However, Palma has the right to seek a certificate of appealability from the Court of Appeals for the Second Circuit. See 28 U.S.C. § 2253; Miller-El v. Cockrell, 537 U.S. 322 (2003). The Clerk of the Court is respectfully directed to remove this case from the docket.

SO ORDERED.

Dated: **New York, New York**
August 12, 2008

John F. Keenan

JOHN F. KEENAN
United States District Judge